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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)))	CC Docket No. 97-146

Reply Comments of CoreComm, Inc., CTSI, Inc., RCN Telecom Services, Inc. and Telergy, Inc.

CoreComm, Inc., CTSI, Inc., RCN Telecom Services, Inc., and Telergy, Inc. (on behalf of its operating companies) hereby file their reply comments in response to the Commission's Public Notice DA 00-1268, released June 16, 2000. CTSI, RCN and Telergy filed initial comments on July 12, 2000.

The overwelming majority of commenters concur that mandatory detariffing of CLEC access charges would not be in the public interest, would increase CLEC costs and would delay provision of new service. There is no dispute that tariffs can provide an efficient and economical means of offering interstate access service. Likewise, there is no dispute that mandatory detariffing would place competitive local exchange carriers at a disadvantage with respect to the incumbents. Mandatory detariffing would not eliminate, and might increase, any Commission involvement in the issues relating to the reasonableness of competitive carrier access charges. Whether tariffed or not, when an issue of reasonableness and lawfulness of rates is raised by an interexchange carrier, the Commission is the entity responsible for ruling on the rates.

Although some interexchange carriers have done a 180 degree flip and, instead of supporting their previous comments against mandatory detariffing of competitive carrier interstate access charges, are now supporting mandatory detariffing (at least for those CLECs whose rates they do not like), these interexchange carriers have submitted no factual evidence to support their call for mandatory detariffing, nor any compelling arguments as to why such action would be in the public interest. In fact they have submitted no arguments for mandatory detariffing other than 1) a general preference for marketplace solutions over regulatory solutions to the perceived problem of high access charges and 2) the removal of CLEC reliance on the filed rate doctrine as a "shield" against allegations of too high rates. The IXCs that have adopted this new found interest in mandatory detariffing appear to be trying to use their market power to drive CLEC access charges down, perhaps below CLEC costs, at the expense of competition in the local market, which they have also sought to enter.

The Commission should be loathe to take any steps that would increase the administrative burdens and start up costs of new carriers who, four years after the passage of the 1996 Telecommunications Act, still have only about five percent of the local service and exchange access market.

I. THERE REMAINS NO PROOF THAT CLEC RATES ARE UNREASONABLE OR ILLEGAL.

A number of commenters concurred with the points made by CTSI, RCN, and Telergy in their initial comments that the Commission's proposal is a solution looking for a problem. To commenters' knowledge, there has never been a finding by the Commission that any CLEC access charges are unlawful, much less a finding that a large number or large percentage of CLEC access charges are unlawful. The comments that recently have been submitted in support of mandatory detariffing contain little information to support a finding that there is any problem that needs to be addressed by the Commission in this manner. While AT&T alleges that "a small but rapidly growing segment of the CLEC industry" charges excessive or "supracompetitive" rates,[1] AT&T has submitted no information to support its allegations.[2] The only significant study of interstate access rates of which we are aware is that submitted by ALTS in CC Dockets 96-252 and 94-1, but that study was primarily of the incumbents' rates. That study indicates, however, that, when the different rate structures and circumstances are taken into account, the average incumbent rate is only marginally lower than some of the rates that the interexchange carriers have alleged are "supracompetitive."[3]

In its comments, Sprint speculates that the difference between the rates charged by CLECs and those charged by the ILECs serving the same territories could amount to $1 billion on an annual basis for the long distance industry, at current volume levels.[4] However, Sprint gives absolutely no support for this statement and does not even indicate how it derived its estimate. Without additional information, it is impossible to comment with any specificity on Sprint's conclusion and the Commission should give no weight to it. We nevertheless note that that estimate is undermined by industry statistics that indicate that the total switched access

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1 AT&T Supplemental Comments at 1 (filed July 12, 2000). At other places, AT&T states that "an appreciable number of CLECs" are committing "abuses." Id. at 7.

2 AT&T submitted some CLEC rate information with its petition for declaratory ruling filed on October 23, 1998 (CCB/CPD File No. 98-63). However, much of that information was discredited in the comments filed in that proceeding. See, e.g., Comments of Winstar at 6.

3 There may be some CLECs whose rates are significantly above other carriers' rates. A rate is not, of course, unreasonable just because it is above other carriers' rates, but if an IXC believes any rate to be unreasonable it is not without recourse. The IXC may file a challenge to those rates with the Commission.

4 Sprint Comments at 2.

revenues of the independent CLECs[5] in 1999 was in the $1 billion range.[6] The Sprint estimate the CLEC access charges were $1 billion over ILEC rates, therefore, could not be accurate.[7]

And, in any event, as the Commission has already held, CLEC rates are not unreasonable or unlawful simply because they are higher than ILEC rates. As the Commission has recognized, there are many reasons why CLEC costs may exceed ILEC costs.[8]

II. THE COMMENTS FULLY SUPPORT A CONCLUSION THAT MANDATORY DETARIFFING WOULD NOT BE IN THE PUBLIC INTEREST

The vast majority of commenters have observed that mandatory detariffing would adversely impact CLECs by significantly increasing their costs and the amount of time it would take to commence business. There is nothing in the record that would support a conclusion that mandatory detariffing would result in lower costs to the competitors or would spur competition.[9] Rather, the comments of the other competitive carriers fully support the initial comments of CTSI, RCN, and Telergy that a requirement to negotiate individually with the several hundred IXCs is infeasible because of the burdens that would be imposed on competitive carriers and

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5 In these Reply Comments, we refer to "independent CLECs" as CLECs other than AT&T and MCI.

6 The $1 billion figure is an estimate, based upon information contained in CLEC Report 2000 by New Paradigm Resources Group ("NPRG"). NPRG reports that the total "switched local service revenues" for virtually all major CLECs including AT&T and Worldcom (f/k/a/ MCI) was $6.2 billion. AT&T and Worldcom had roughly 2/3 of that market. Therefore, the independent CLECs had "switched local service revenues" of slightly over $2 billion. "Switched local service revenues" include both local service and exchange access revenues. Even if one were to assume that CLEC interstate access revenues were about 50 percent of their total "switched local service revenues," a percentage that is much higher than the percentage reported by the incumbents and therefore for these purposes rather generous, total independent CLEC interstate switched access revenues would be in the one billion dollar range.

7 In addition, of course, there is evidence that a number of CLECs have based their interstate access charges on the corresponding ILEC charges so there will be no difference between the ILEC and the access charges of those CLECs.

8 Sprint Communications Co. v. MGC Communications, Inc. File No. EB-00-MD-002 (rel. June 9, 2000).

9 The only Commenter to claim that detariffing would lower transaction costs for carriers was the Ad Hoc Telecommunications Users Committee, but their comments provided no support for their argument and of course they are not a carrier and would have little first-hand knowledge of the costs.

because of the increased possibility of end users being denied service. In addition, as noted by several commenters, the mandatory detariffing of interstate access service presumably would have no immediate effect upon the state tariffing requirements. Thus, CLECs would be put in the position of having to file intrastate tariffs *and* negotiating with hundreds of individual IXCs, even those IXCs that do not market their services in the regions that the CLECs provide service. This necessarily would have an adverse effect upon competition.[10]

There is likewise nothing in the record that would support a conclusion that mandatory detariffing would, on balance, decrease the Commission's administrative costs or the involvement of the Commission in any issues relating to the reasonableness of competitive carriers interstate access rates. Because of the various measures that the Commission has taken in the past few years to streamline tariffing filing requirements, the Commission's costs in maintaining those tariffs have decreased. And mandatory detariffing would not relieve the Commission of resolving Section 208 disputes that undoubtedly would arise if carriers could not come to a voluntary agreement. While Section 208 complaints can be filed when carriers have tariffs on file, there is a distinct possibility of an increase in discrimination claims if mandatory detariffing were ordered. Therefore, there is no evidence that the number of complaints to be handled would decrease, and in fact they might increase, if the Commission were to order mandatory detariffing.

[10] As noted by some commenters, this could even become a barrier to entry for some competitors. See, e.g., Comments of Focal at 8.

III. THE CARRIERS SUPPORTING MANDATORY DETARIFFING PROVIDE NO COMPELLING ARGUMENTS AS TO WHY MANDATORY DETARIFFING WOULD BE IN THE PUBLIC INTEREST.

As the Commission knows, until the filing of the most recent comments, whenever the issue of mandatory detariffing of competitive carrier interstate access charges arose, all segments of the industry were opposed to mandatory detariffing.[11] With the latest round of comments, the IXC industry, or those that filed comments, is now split between those that advocate complete detariffing of CLEC interstate access charges and those that seek additional Commission oversight of CLEC access charges. Worldcom and AT&T are partially supporting mandatory detariffing. Sprint and Global Crossing generally argue that the Commission should more actively regulate CLEC access charges, but in the absence of such active regulation should consider mandatory detariffing with certain conditions. For the reasons articulated above, mandatory detariffing would be harmful to the competitive interests and the Commission's universal service mandates under the Telecommunications Act of 1996. And, because the Commission can review individual carrier rates when challenged, increased scrutiny of CLEC rates in general is not warranted or necessary.

As noted, the argument of the IXCs supporting mandatory detariffing is that the Commission should act because of its general preference for marketplace solutions over regulatory solutions and concerns about the filed rate doctrine. CoreComm, CTSI, RCN and Telergy concur that as a general matter marketplace solutions are preferable to regulation. But, this is not a circumstance in which a problem has been shown to exist or, even if it did exist, is

[11] In previous comments filed in these proceedings all IXCs argued against mandatory detariffing. See, e.g., Comments of AT&T in CC Dkt 97-146 (filed Sept. 17, 1997).

an appropriate one for a marketplace solution. The comments in this proceeding have sufficiently distinguished the CLEC exchange access market from the IXC market where the Commission (justifiably) found that mandatory detariffing was in the public interest. In addition, there is sufficient evidence that mandatory detariffing is likely to increase administrative costs of providing service. Likewise, if concerns about the filed rate doctrine were sufficient to adopt mandatory detariffing, the Commission would have to detariff all services. In any event, the filed rate doctrine does not protect a carrier from a finding by the Commission that a carrier's rates are unreasonable and that is the primary concern of the IXCs supporting mandatory detariffing.

AT&T states that the Commission should retain its current permissive detariffing policy for those CLECs whose switched access rates do not exceed those of the ILECs in their service territories, and detariff only the rates of those CLECs whose charges exceed those levels. AT&T clearly understands the advantages of tariffing of services, but has proposed that those advantages only be available to those carriers whom AT&T has deemed to have reasonable rates.[12] Once again AT&T has set itself up as the arbiter of the reasonableness of rates. Under the Communications Act of 1934, as amended, it is the Commission, however, that has the task of ruling on the reasonableness of rates. (And this is true regardless of whether the rates are set by tariff or by contract.)

In addition, AT&T's proposal is unworkable. It is counter-intuitive to suggest a detariffing rule based upon the rates charged, rather than market characteristics. AT&T's proposal would result in competitive carriers bouncing back and forth between the mandatorily

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12 AT&T fully admits "[T]he use of tariffs provides significant efficiencies and economies to legitimate access carriers. Providing entrenched incumbents with a further cost advantage over new competitive entrants cannot be squared with the Commission's objectives in these proceedings." AT&T Supplemental Comments at 8.

detariffed group and the permissively detariffed group as they (or, worse yet, the incumbents) changed their rates. Whether a carrier is subject to mandatory detariffing should depend neither upon its rates nor the rates of its competitors.

IV. NEGOTIATION IS NOT AN ACCEPTABLE METHOD FOR SETTING CLEC INTERSTATE ACCESS CHARGES.

Initial comments make clear that CLEC negotiations not only of rates, but also of terms and conditions, with hundreds of IXCs is not a feasible approach to setting CLEC interstate access charges. AT&T states that mandatory detariffing would impose significant and unwarranted burdens both on access customers and CLECs to negotiate mutually satisfactory contractual access arrangements with each IXC, even where the CLECs' tariffed rates were otherwise acceptable to the IXCs.[13]

Other commenters also show that negotiating access charges would impose additional unacceptable burdens on CLECs in terms of transaction costs, personnel, time and legal expenses. It is also likely that CLECs would be required to expend more time and resources litigating their right to obtain payment for access services received by IXCs if access were negotiated rather than offered by tariff.

Using negotiation to set CLEC interstate access charges is also unacceptable because IXCs (at least the larger IXCs) have superior bargaining power. A negotiated approach to setting CLEC interstate access charges could only constitute an acceptable marketplace approach to setting CLEC interstate access charges if the parties were of roughly equal bargaining power. Absent a rough equality in bargaining power, interstate access charges could be set at a level that is not compensatory, and undermine CLECs' ability to compete. Sprint, the third-largest IXC, states that reliance on bilateral negotiations for access rates could have adverse public policy consequences and introduce distortion into telecommunications markets because this would favor large IXCs and large LECs over their smaller competitors.[14] The larger the IXC, Sprint states, the more a given CLEC would need to be able to complete calls to that IXC's customers in order to compete with the incumbent LEC and, consequently, the more that IXC could bring pressure on the CLEC to obtain lower access charges.[15]

As RBOCs obtain in-region long distance authority, their long distance affiliates would also be able to assert undue negotiating power since unavailability of the RBOC's long distance services to a CLEC's customers could make the CLEC's local service less viable.[16] CLEC negotiations with an RBOC long distance affiliate would be particularly untenable since CLECs are also dependent on ILECs for access to essential network elements and interconnection in order to provide service. And by driving a hard bargain with CLECs, the RBOC long distance affiliates would be helping their LEC affiliates in the competitive struggle with CLECs in the local exchange market.

Apart from the burdens imposed on CLECs and inequality of bargaining power, the negotiation approach is unacceptable for setting CLEC interstate access charges, because it would appear to conflict with CLECs' nondiscrimination obligations under Sections 201 and 202 of the Act. Negotiation implies that parties could achieve prices for interstate access services that are different from those agreed to by other parties. Confronted with the superior bargaining power of a major IXC, a CLEC may be compelled to give favorable prices to that IXC and

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13 AT&T Comments at 8.

14 Sprint Comments at 3-4.

15 *Id.* at 3.

16 *Id.* at 4.

charge lesser IXCs a greater amount in order to recover costs. It is not clear how this would comply with the nondiscrimination provisions of the Act. The same is true with respect to terms and conditions: if a major IXC were able to extract more favorable terms and conditions from a CLEC than the IXC's competitors could get, the resulting discrimination might violate the nondiscrimination provisions of the Act. Moreover, it is precisely because CLECs are subject to the nondiscrimination provisions of the Act that tariffing makes sense. There is no reason to negotiate prices individually with IXCs if the Act requires CLECs to charge the same to each IXC in any event. The Commission has not explained how a negotiated approach to setting CLEC access charges would be consistent with the Act

For all these reasons, a negotiated approach to setting CLEC interstate access charges is infeasible and should not be adopted.

V. THE COMMISSION SHOULD REJECT OUTRIGHT AT&T's REQUEST THAT THE COMMISSION CLARIFY THAT IXCs HAVE NO OBLIGATION TO INTERCONNECT WITH CLECs.

Finally, AT&T has asked that the Commission make it clear that the IXCs have no legal obligation to order or otherwise accept a CLEC's access services – either under tariff or an intercarrier contract. First, of course, comment on this issue was not sought in the public notice issued by the Commission. Therefore, the Commission is not in a position to rule on AT&T's request.[17] Moreover, on a substantive level, AT&T is clearly wrong. The Communications Act specifically requires all telecommunications carriers to "interconnect directly or indirectly with

[17] AT&T's request is in the nature of a petition for declaratory ruling. If AT&T seeks such a ruling, it should refile the request as a request for declaratory ruling so that the Commission could put the request out for public comment.

the facilities and equipment of other telecommunications carriers."[18] AT&T and other IXCs must interconnect with all other carriers. If IXCs or other carriers had the ability to pick and choose which carriers with which they deal, end users would never know whether and when their calls would be completed and the Commission would not be able to satisfy its universal service statutory mandate.[19]

AT&T would have the Commission believe that if it is "forced" to interconnect with all carriers, it will be helpless to deal with carriers that have unreasonable rates. AT&T asks that the Commission "foreclose the CLEC's ability to continue harassing IXCs and their customers in this manner." AT&T knows perfectly well how to use the statutory tools given by Congress to challenge those rates, but has instead chosen to take it upon itself to determine what access rates it will pay and what access rates it will not pay. AT&T ignores the fact that whether rates are set by tariff or by contract they must be "reasonable"[20] and that any carrier or end user has the ability to challenge a carrier's rates. The Commission has the authority to rule on the rates and to offer refunds should rates be deemed unreasonable and unlawful.

The statutory scheme is clear. Congress understood that a competitive system would only work if all carriers are required to accept traffic from each other. However, no carrier was left helpless to deal with another carrier that it feels is unreasonable. The Telecommunications Act provides sufficient remedies for carriers that are presented with unreasonable

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18 47 U.S.C. § 251(a).

19 As the General Services Administration noted, a requirement of mandatory detariffing could result in an impairment of interconnection, a reduction in opportunities for local competition, and "seriously limit communications options and impair achievement of the Commission's pro-competitive and universal service initiatives." Comments of GSA at 4.

20 47 U.S.C. § 201(b).

interconnection rates.[21] There is a requirement that the carrier provide a complete service to its end user first, and then challenge any connecting carrier's rates, but this is as it must be if the end users are to be protected.

CONCLUSION

There are no countervailing benefits from mandatory detariffing that can not be achieved through permissive detariffing. Therefore, there is no reason to subject CLECs to the additional costs and competitive disadvantages that would be associated with mandatory detariffing of interstate access services.

Respectfully submitted

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[21] As several commenters note, the complaint process is the proper venue for addressing IXC concerns.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2000, a copy of the Reply Comments of CoreComm, Inc., CTSI, Inc., RCN Telecom Services, Inc. and Telergy, Inc. was served by hand or via first-class mail, postage prepaid, on the entities listed on the attached pages.

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